

U.S. Supreme Court,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 43

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP
OF ALASKA INDIANS,

Petitioner

v.

THE UNITED STATES,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

**BRIEF ON BEHALF OF THE STATE OF NEW MEXICO
AS AMICUS CURIAE**

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INDEX

	Page
Statement of interest of the State of New Mexico	1
Argument:	
I. Claims based on original Indian title are compensable under the Indian Claims Act without regard to the holding below	2
A. This Court by implication has recognized that claims based on original Indian title are compensable under the Indian Claims Act	5
B. The Court of Claims in its appellate capacity has confirmed that claims based on Indian title are compensable under the Indian Claims Act	8
II. Reversal of the decision below will not result in huge recoveries of principal and interest such as implied by the Government	9
Conclusion	14
Appendix	15

CITATIONS

Cases:

<i>Alcea Band of Tillamooks v. United States</i> , 115 C. Cls. 463	6
<i>Assiniboine Indian Tribe v. United States</i> , — C. Cls. —, Appeal No. 1-53	9
<i>Chippewa Indians v. United States</i> , 301 U. S. 358	12
<i>Hynes v. Grimes Packing Co.</i> , 337 U. S. 86	6
<i>Otoe and Missouri Tribe v. United States</i> , — C. Cls. —, Appeal No. 1-54	19
<i>Otoe and Missouri Tribe v. United States</i> , 2 Ind. Cls. Comm. 335	11, 12
<i>Pawnee Tribe v. United States</i> , 124 C. Cls. 324	9
<i>Quapaw Tribe v. United States</i> , — C. Cls. —, Appeal No. 1-52	9
<i>Shoshone Tribe v. United States</i> , 299 U. S. 476	12, 14
<i>Snake or Piute Indians v. United States</i> , 125 C. Cls. 241	9

	Page
<i>United States v. Alcea Band</i> , 329 U. S. 40	4, 5
<i>United States v. Alcea Band</i> , 340 U. S. 873	7
<i>United States v. Alcea Band</i> , 341 U. S. 48	6, 7
<i>United States v. Creek Nation</i> , 295 U. S. 103	12
<i>United States v. Goltra</i> , 312 U. S. 203	12
<i>United States v. Klamath Indians</i> , 304 U. S. 119	12
<i>United States v. Santa Fe Pacific R. Co.</i> , 314 U. S. 339	2

Statutes:

Act of March 3, 1911, c. 231, sec. 153, 36 Stat. 1138	4
Act of March 3, 1863, c. 92, sec. 9, 12 Stat. 767	4
Indian Claims Act of August 13, 1946, c. 959, 60 Stat. 1049	1, 3
R. S. 1066	4
25 U. S. C. 70s	8
28 U. S. C.	
Section 250	4
Section 259	4
Section 1491	4
Section 1505	3, 4
Section 2501	3

Congressional Material:

Hearings, House Committee on Indian Affairs, H. R. 1198, H. R. 1341, 79th Cong., 1st sess., June 11, 1945	4, 11
H. Rept. No. 1466, 79th Cong., 1st sess., (1945)	4
S. Rept. 1715, 79th Cong., 2d sess., (1946)	11
H. Rept. 2693, 79th Cong., 2d sess., (1946)	5, 11
H. Rept. 2503, 82d Cong., 2d sess., (1952)	
Hearings, Independent Offices Appropriations, 1955, 83d Cong., 2d sess., (January 4, 1954) Part I	13
93 Cong. Rec. 5307-5316	5
pp. 5307-8	5
p. 5308	5
p. 5312	5
p. 5316	5

Miscellaneous:

Report, Commissioner of Indian Affairs, 1890	3
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Statement of Interest of the State of New Mexico

There are over 40,000 Indians in New Mexico—Navajos, Apaches, Pueblos and Zunis. The Navajos, Apaches and Pueblos have claims pending before the Indian Claims Commission under the Indian Claims Act of August 13, 1946, c. 959, 60 Stat. 1049.¹ The Government apparently

¹ Navajo: Dockets Nos. 69, 229, 299, 353; Apaches: Docket Nos. 22, 30, 32, 48, 49, 182, 223, 257, 258, 259; Pueblos: Dockets Nos. 137, 211, 227, 266, 355, 356, 357 and 358. See H. Rept. 2503, 82d Cong., 2d sess. (1952) pp. 471, 232 and 543.

expects the decision in the *Tec-Hit-Ton* case to control or affect the claims before the Indian Claims Commission (Memorandum for the United States in response to petition for certiorari, pp. 9-10). The Indian citizens of New Mexico are entitled to have their claims adjudicated on the merits through the Indian Claims Act as intended by Congress and not to have them fixed by a decision in a case arising under the general jurisdiction of the Court of Claims. The interests of the Indians of New Mexico are not represented by petitioner in the case at bar. Ever since the decision of this Court in *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 346, it has been understood in New Mexico that no distinction is made among the Indian tribes in this country with respect to the nature of their aboriginal title. Here, however, the petitioner distinguishes its claim on the ground that original title in Alaska is not the same as aboriginal Indian title in the States. In addition, the petitioner's claim turns on the jurisdiction of the Court of Claims, not the Indian Claims Commission. It is the interest of the State of New Mexico to advance and protect the rights of its Indian population and this brief *amicus* is submitted to show that there is no controlling connection between the claim at bar and aboriginal title claims before the Indian Claims Commission.

Argument

I. *Claims based on original Indian title are compensable under the Indian Claims Act without regard to the holding below.*

In this case the Court of Claims has held that as against the United States an Indian tribe has no right in land held by original Indian title "unless Congress had recognized the tribe's interest as a legal interest" (R, 26). This is but an oblique way of saying that original Indian title is not com-

pensible under the Fifth Amendment. This claim for the taking in 1951 of an interest in land exclusively used and occupied by an Alaskan Indian tribe—that is, land held by original Indian title—is an isolated case. It cannot arise in the future in the 48 States since all original Indian title in the States was long ago extinguished.² The only possibility of such claims in the future would be limited to Alaska and would be controlled by the six year statute of limitations (28 U. S. C. 2501). This puts the claim on a par with those of non-Indians and should entitle it to the same constitutional protection extended to non-Indians. Only clear and compelling reasons should lead this Court to hold that the Government, without paying compensation, may deprive an Indian tribe of the country it possesses and has exclusively occupied from time immemorial.

But, the Government has not dealt with the case in this context. This case is merely a weapon. The real target is the claims filed before the Indian Claims Commission under the Indian Claims Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U. S. C. 70 et seq.). Thus the Government has represented that the decision below controls or affects "about half" of the claims filed before the Indian Claims Commission. (Memorandum for the United States in response to petition for certiorari, pp. 9-10.) We believe that representation to be without valid support.

Two sections of the Indian Claims Act deal with original jurisdiction over tribal claims. Section 2 defines the jurisdiction of the Indian Claims Commission and section 24 (now 28 U. S. C. 1505) defines the jurisdiction of the Court of Claims under which the *Tee-Hit-Ton* case arises. However, the two jurisdictions are not coextensive. In the Court of Claims the tribal litigant is confined to claims arising

² "The Indian title has been extinguished to all the public domain, except Alaska * * *." Report, Commissioner of Indian Affairs, 1890, p. xxx.

after August 13, 1946.³ As to those claims the tribe stands on the same footing as any non-tribal suitor. On the other hand the Indian Claims Commission's jurisdiction is retroactive to claims arising on and before August 13, 1946 (sections 2 and 12 of the Indian Claims Act). Before the Commission (under section 2, clauses (1) and (2)) the tribal claimant has rights equivalent to those it has in the Court of Claims in post-August 13, 1946 claims and in addition, has much broader rights under section 2, clauses (3), (4) and (5) of the Indian Claims Act. Clauses (3), (4) and (5) are stated in "unusually broad language"⁴ to carry out the Congressional intent that there be put at rest all possible and conceivable tribal claims, legal, equitable and moral.⁵

³ Prior to section 24 of the Indian Claims Act, the Court of Claims under its general jurisdiction could not take cognizance of any claim against the United States "growing out of or dependent upon any treaty stipulation entered into with foreign nations or with the Indian tribes." Act of March 3, 1863, c. 92, sec. 9, 12 Stat. 767, contained in R. S. 1066 and made part of the Judicial Code by the Act of March 3, 1911, c. 231, sec. 153, 36 Stat. 1138 (28 U. S. C. 259). To put "the Indian on the same basis, as far as his record in the Court of Claims goes, as any white man", this limitation was wiped out by section 24 of the Indian Claims Act. Hearings, House Committee on Indian Affairs, H. R. 1198, H. R. 1344, 79th Cong., 1st sess., June 11, 1945, p. 139. H. Rept. No. 1166, 79th Cong., 1st sess., (1945), p. 13. Under Section 24, Indian tribes were given the same right as other litigants to maintain suit under the general jurisdiction of the Court of Claims (28 U. S. C. 259, now 28 U. S. C. 1491). When the United States Code was revised, section 24 of the Indian Claims Act was incorporated into title 28, and now appears as 28 U. S. C. 1595.

⁴ Mr. Justice Black's reference to the Indian Claims Act in *United States v. Alcea Band*, 329 U. S. 40, 55.

⁵ Broad and comprehensive language was deliberately chosen to carry out the objectives of the Act—namely to free Congress from the insistent demands of the tribes for special jurisdictional acts and to bring all tribal claims to a final determination. This is reflected throughout the legislative history and there is nothing to the contrary, e. g. H. Rept. No. 1166, 79th Cong., 1st sess., (1945), p. 2: " * * * giving them a full and untrammeled right to have their grievances heard * * *"; *Idem*, p. 3: "Purpose of the Bill * * * It would require all pending Indian claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted * * *"; *Idem*, p. 49: "Jurisdiction. In order that the decisions reached under the

The Court of Claims has no jurisdictional counterpart to clauses (3), (4) and (5). The case below was decided under the general jurisdiction of the Court of Claims, not under language in any way comparable to clauses (3), (4) or (5). Accordingly, affirmance of the decision below would not stand for the proposition that original Indian title is not compensable under the Indian Claims Act (clauses (3), (4) and (5)). Of course, reversal of the decision below on the ground that original Indian title is compensable under the Fifth Amendment, would leave the Government without any excuse for asserting that Indian title is not compensable under the Indian Claims Act.

A. *This Court by implication has recognized that claims based on original Indian title are compensable under the Indian Claims Act.* In the first *Alcea* case (*United States v. Alcea Band*, 329 U. S. 40) a majority of this Court implicitly recognized that claims based on original Indian title were compensable under the Indian Claims Act. Mr. Chief Justice Vinson, joined by three associates stated (329 U. S. at p. 49): "[under the Indian Claims Act] not only are claims similar to those of the case at bar [original In-

proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include *all possible claims*. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts;" *Idem*, pp. 14-18 where the Attorney General and the Secretary of the Interior favored the disposition of "all" claims. (Emphasis supplied.) During the debates in the House (93 Cong. Rec. 5307-5316) the Chairman of the Rules Committee, the manager of the bill, the Chairman of the Committee on Indian Affairs and the committee leader of the minority party made clear that the bill was to "put an end to these tribal claims," 93 Cong. Rec. pp. 5307-8; to settle them "once and for all", p. 5308; "bring them to a conclusion once and for all" to give tribes "an opportunity to present all their claims of every kind, shape and variety", to include "all possible claims", p. 5312, to "give the Commission the broadest possible jurisdiction to consider every Indian grievance, real or fancied", p. 5316. See also the conference report, H. Rept. 2033, 75th Cong., 2nd sess. (1946).

dian title claim] to be heard, but 'claims based upon fair and honorable dealings * * * may be submitted to the Commission * * *'. Mr. Justice Black who concurred in the affirmance expressed this thought more strongly when he stated (329 U. S. at pp. 54-55) that the *Alcea* jurisdictional act "created an obligation on the part of the Government to pay these Indians for all lands to which their ancestors held an 'original Indian title'"; that this interpretation fitted "into the pattern of congressional legislation which has become progressively more generous in its treatment of Indians", the capstone of which was the Indian Claims Act. Mr. Justice Black was of the view that since the *Alcea* claim could be pursued under "this broad recent legislation [Indian Claims Act]" the *Alcea*'s special jurisdictional act should be given a "similarly broad interpretation".

The second *Alcea* case (341 U. S. 48) was limited to the question of "interest" which the Court of Claims had allowed (115 C. Cls. 463). The Government had asked not only for review of the "interest" question but also for review of the issues of liability and valuation. In its petition for certiorari it argued that Mr. Justice Reed's note in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106n., so heavily relied upon in the court below (R. 19-20), expressed this Court's view that liability was created by the jurisdictional act and did not stem from the Fifth Amendment.⁶ The Government contended that, if there was no taking under the Fifth Amendment and if the jurisdictional act did not create the liability, there was no liability for either principal or interest (Petition, Docket No. 281, Oct. Term, 1950, pp. 7-8).

⁶After quoting the footnote from the *Hynes* case, the Government in its petition for certiorari in second *Alcea* stated (Petition, Docket No. 281, Oct. Term, 1950, p. 10): "The italicized phrase — 'specific legislative direction to make payment' — plainly treats the legislative direction as creating the liability rather than simply the removal of obstacles to suit."

This Court with full cognizance of Justice Reed's footnote in the *Hynes* case, denied the Government's petition so far as the questions of liability and valuation were concerned and limited the grant of certiorari to the question of "interest". (340 U. S. 873.)

In its brief on the merits the Government again quoted in full Justice Reed's footnote in the *Hynes* case and again argued that the footnote "has been taken by the Government as some indication that a majority of the Court might be of the view that unrecognized 'Indian title' is not constitutionally compensable * * *" thus precluding interest.⁷ In its per curiam opinion denying interest, this Court disregarded the argument and made no mention of the *Hynes* case. It treated the *Alcea* case as one where the recovery was not grounded on the Fifth Amendment.⁸ That being so, the question of whether original Indian title was compensable under the Fifth Amendment was neither considered nor decided. Interest was disallowed on the authority of cases holding "that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract" (341 U. S. 48, 49). No further reason was given for the allowance of the principal sum of the award, since that question was not up for review. Most important, the Court did not accept the Government's invitation to convert the dictum in Justice Reed's footnote in the *Hynes* case into law. This supports the view that in the second *Alcea* case this Court by implication rejected the argument founded on the *Hynes* footnote. We say by implication since this Court affirmatively cited the line of cases holding

⁷ Docket No. 281, Oct. Term 1950, Brief for the United States, p. 18. See also pp. 17-19.

⁸ "Looking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under Fifth Amendment" (341 U. S. at p. 40).

interest not allowable unless expressly authorized but said nothing about lack of compensability of Indian title.

It seems to us that the two *Alcea* decisions together hold that, under the special jurisdictional act, the *Alcea* band could recover compensation for the appropriation of land held by original Indian title but could not recover interest. This leaves open to inference the basis of this Court's action in allowing principal and denying interest. The authorities cited by the Court in second *Alcea* support only the view that it was the jurisdictional act which permitted payment of compensation without interest in the *Alcea* case. If that is so, then we say that clauses (3), (4) and (5) of section 2 of the Indian Claims Act do the same. Those clauses are fully as comprehensive as the *Alcea* jurisdictional act. If the latter authorizes payment, so do clauses (3), (4) and (5). The Government itself so construed clause 4 in its petition for certiorari in the second *Alcea* case, when, after quoting section 2 of the Indian Claims Act in full, it stated to the Court (Petition, Docket No. 281, Oct. Term, 1950 p. 9, n. 5): "*Clause (4) seems not to differ in substance from the special act involved in this [Alcea] case.*"

B. *The Court of Claims in its appellate capacity has confirmed that claims based on Indian title are compensable under the Indian Claims Act.* Under its appellate jurisdiction (25 U. S. C. 708) the court below has reviewed decisions of the Indian Claims Commission on claims based on "Indian title" arising under clauses (3), (4) and (5). In every instance the court below has treated such claims as compensable.⁹ The decision below in no sense was intended to mark a departure from the consistent view that claims founded on original Indian title are compensable under the Indian Claims Act.

⁹ In its answers to claims before the Commission which in any form involve original Indian title the Government has included the stock defense

II. Reversal of the decision below will not result in huge recoveries of principal and interest such as implied by the Government.

The Government has elected to use this case before this Court as the vehicle for establishing that original Indian title is not compensable either under the Fifth Amendment or under the Indian Claims Act. In its memorandum in

that original Indian title is not compensable and the claim should be dismissed. The Indian Claims Commission has consistently rejected this defense and dealt with the claims on the merits. On appeal the Government has unsuccessfully advanced the same defense in support of the Commission's dismissal on the merits. *Snake or Plate Indians v. United States*, 125 C. Cls. 241, 244, n. 1 (1953) setting aside the Commission's dismissal and remanding for proper findings a claim based on the taking without any compensation of land held by original Indian title. In *Pawnee Tribe v. United States*, 124 C. Cls. 324, 327-328 (1953), involving three "unconscionable consideration" claims, that is, claims for the difference between the treaty consideration and the value at the time of the treaty ceding land held by original Indian title, the court below refused to adopt the Government's view and dispose of the appeals on the ground Indian title was not compensable but instead remanded the case for further proceedings on the merits. *Quapaw Tribe v. United States*, — C. Cls. —, slip opinion pp. 2-4 (Appeal 1-52 decided April 6, 1954) where the court below affirmed the Commission's dismissal on the merits of an "unconscionable consideration" claim. See also *Assiniboine Indian Tribe v. United States*, — C. Cls. —, slip opinion p. 12 (Appeal No. 1-53, decided June 8, 1954) where the court stated:

* * * As to the latter class of claims [meaning those under clauses (2), (3), (4) and (5)] which marked the real departure by Congress from the normal situation previously existing in Indian litigation, there was clearly a real departure from prior practice and procedure, and it is perfectly clear from the provisions of the act and its history that this was intended for the purpose of closing out tribal claims for ancient wrongs, real or supposed.

After the decision below, the Government urged the Court of Claims, on authority of its *Tee-Hit-Tow* holding, to reverse the determination of the Commission in an "unconscionable consideration" case granting an award without interest representing the difference between the treaty consideration and the market value of land held by original Indian title which was ceded by the treaty. The Government is contending that the Indian Claims Act permits recovery only in claims founded on "recognized title" and not on original Indian title. *Otoe and Missouri Tribes v. United States*, Appeal 1-51, C. Cls. Brief of United States, appellee and cross appellant, pp. 30-33, filed April, 30, 1954.

response to the petition for certiorari the Government refers to the "impact" of the question here presented to about 400 claims filed before the Indian Claims Commission asserting those claims "involve in some form or other the question of compensability of original Indian title."¹⁹ The inference is that huge sums of principal plus "interest" as a measure of just compensation, will be allowed under the Indian Claims Act if this Court here holds that the Constitution protects the original property of Indian Tribes. We should like to give the *quictus* to this pseudo-pragmatical approach.

In the first place, assuming *arguendo* that the Fifth Amendment covers claims under the Indians Claims Act

¹⁹ Memorandum of the United States in response to the petition for certiorari, pp. 9-10, n. 8. For a detailed list of the cases pending before the Commission the respondent referred the Court to the appendix to the Government's brief in *United States v. Alcea Band of Tillamooks*, No. 281, October Term, 1950. As pointed out by the Government that list was compiled as of January 10, 1951, prior to the expiration of the cut-off date for filing claims. That list was an "estimate of amount claimed" based solely on the allegations of acreage, value and interest contained in each petition. The Act was then new and perhaps it was not possible to sift out those claims which would be affected by a holding that original Indian title is compensable under the Fifth Amendment. Similarly, since all claims had not been filed, the Government could not know the extent of overlapping claims for the same land. But that was not true when the Government filed its memorandum in this case. The Government has the defense of all these claims and should be in a position to furnish the Court with a table showing the claims which would be affected by this case. Apparently it has elected to rest on its approximation that about 400 claims "involve in some form or other the question of the compensability of 'original Indian title'." (Government's memorandum on certiorari, p. 10.) The Government's estimate does not take into account the overlapping claims, of which it is aware since it has filed numerous motions to consolidate claims for the same land. Moreover, the estimate is not limited to claims for the appropriation of land held by original Indian title where there was no ratified treaty of cession. As we see it, the latter class are the only ones which should be included in the count, and even those claims would be affected only if this Court should hold that they were compensable under the Fifth Amendment, rather than section 2, clause (4) of the Indian Claims Act. Appendix, pp. 15-17, shows there are only 72 such claims.

for the appropriation of land held by original Indian title,¹¹ there are at most 72 such claims, not 400, as asserted by the Government. In the second place, as to those 72 claims, the pertinent thing is the probable recovery, not the exaggerated amounts traditionally claimed in petitions. In the third place, even if there is liability under the Fifth Amendment there is no compulsion on the Indian Claims Commission to measure just compensation in terms of interest.

First, assuming *arguendo* it is finally held that the Fifth Amendment embraces Indian Claims Commission claims for

¹¹ The question of whether the Fifth Amendment includes such claims should be determined in a case arising under the Indian Claims Act and not under the general jurisdiction of the Court of Claims. The Indian Claims Commission has held that section 2, clauses (3) and (5) do not provide for interest. *Otoe and Missouri Tribe v. United States*, 2 Ind. Cls. Comm. 335, 373. Neither does section 2, clause (4) contain such a provision and the Court's attention is directed to the legislative history of the Indian Claims Act which may indicate that section 2, clause (4) and not section 2, clause (1) of the Indian Claims Act was intended to include claims for the appropriation of land held by original title.

The language now incorporated in clause (4) was first suggested to the House Committee on Indian Affairs by the Assistant Solicitor of the Department of Interior Felix S. Cohen to "give express recognition to one of the most clearly just and grievously resented classes of claims, that growing out of the scattered instances where lands peaceably held under an uncontested Indian title have been expropriated without an act of cession on the part of the Indians, or where the Government has retained ceded lands notwithstanding its failure to ratify or carry out the terms of the cession". Hearings, H. R. 1198 and 1341, 79th Cong., 1st sess., p. 141. In the Senate the clause was stricken for purposes of clarification but not "to deprive claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House." (S. Rept. 1715, 79th Cong. 2d sess., (1946), p. 5.) After the bill went to conference what is now clause (4) was restored. The House Conference report recited (H. Rept. 2693, 79th Cong. 2nd sess., (1946) p. 5): " * * * The second of these classifications (clause 4) covers claims arising from the taking by the United States of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy.' Sometimes these lands were taken under the guise of stipulated treaties, sometimes without any semblance of a treaty. The recognition of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor."

the taking of original Indian title, the only claims before the Commission which would be affected by such a decision would be those under section 2, clause (4), where the land held by original title was taken by the United States without a treaty of cession (e. g. situations such as the one presented in the *Alcea* case.)¹² There are only 72 claims falling in that class and of these 51 cover all or a portion of the same land and therefore duplicate each other.¹³ See Appendix, pp. 15-17. Final judgment has not been rendered on any of these claims.

Second, an honest estimate of the potential recoveries

¹² It would not affect claims for the taking of tribal land held by "recognized" title (section 2, clause (1)) since under the law such claims are clearly compensable under the Fifth Amendment. *United States v. Klamath Indians*, 304 U. S. 119; *Chippewa Indians v. United States*, 301 U. S. 358, 375; *Shoshone Tribe v. United States*, 299 U. S. 476; *United States v. Creek Nation*, 295 U. S. 193. It would not affect possible claims based on "tortious" takings (section 2, clause 2) never subsequently ratified by the United States and never converted into lawful takings. We are not aware of any such claims before the Indian Claims Commission but if such there be the claimant would not be entitled to an increment above the principal sum under the doctrine of *United States v. Gholtra*, 312 U. S. 203, 209-210. It would not affect claims based on revision of treaties, contracts or agreements, (section 2, clause 3)—e. g. where land held by Indian title is ceded to the United States for an unconscionable consideration. Recovery in such instances is limited to the difference between the treaty consideration and the value of the land at the time of the cession without interest. Since these claims are founded on the treaty or other contract no interest may be recovered. The Commission has allowed recovery in such a case in only one case and there it specifically denied interest on the ground that the Indian Claims Act "does not provide for the allowance of interest on awards made under clauses (3) or (5) * * *". *Ojibwa and Missouri Tribe v. United States*, 2 Ind. Cls. Comm. 335, 373 (1953). It would not affect claims based on "fair and honorable dealings" (section 2, clause 5) since such claims are moral in nature and there is no basis for allowing "interest", *Ojibwa and Missouri Tribe v. United States*, *id. supra*. At most it would affect the claims under section 2, clause 4 discussed in the text.

¹³ There may be overlaps on the 51 claims in addition to those shown. Also, it is possible that some of the remaining 21 claims are overlapped, since the search on which the Appendix was constructed was necessarily limited by time. It might be pointed out that of the 21 claims shown without overlaps, eight (signalled with an *) are in Alaska and six are Pueblos claims for relatively small acreage.

should not be based on the prayers in the petition.¹⁴ As of December 1, 1953, the Commission had disposed of 48 cases where there had been no reversal. None included claims based on takings of land held by aboriginal Indian title where there was no ratified treaty. The total of the awards in the 48 cases was \$7,399,815 while the total claimed without interest was \$544,403,697 and this latter figure includes only those of the 48 cases where the petition specified the amount claimed. This ratio of 7 to 544 is the best available indicator of the spread between recoveries and amounts claimed. The awards of \$7,399,815 were made in eight cases. In those eight the total claimed was \$110,568,895 so that even in the successful cases the ratio of awards to amounts claimed was 7 to 110.¹⁵

Third, assuming cases falling under section 2, clause 4, are entitled to just compensation under the Fifth Amendment there is nothing in the law which compels the allowance of interest as such. This Court has made it plain that the "increment [may] be measured either by interest on the value or such other standard as may be suitable in the light of all circumstances." *Shoshone Tribe v. United*

¹⁴ This is pointed up by the following colloquy between the Chief Commissioner of the Indian Claims Commission and a member of the House subcommittee on appropriations during the Hearings on the appropriation for the Commission, Hearings, Independent Offices Appropriations, 1955, 83d Cong., 2d sess., (January 4, 1954) Part 1, pp. 96-97:

Chief Commissioner: I might liken to Texas experiences and that is that all cows that were killed by the railroads in the old days were always Jerseys.

Mr. Thomas: And they were registered too and they always had a high pedigree.

Mr. Witt: Yes, sir, that is right. When they claim for this acreage, there is no limit to what they might claim, but when we have a claim for \$2 or \$3 an acre and more—as of 1865—the award usually is from 50 cents to a dollar figure. They usually claim interest also, but we have never found any liability as yet for interest.

¹⁵ All figures are taken from statistics furnished by the Indian Claims Commission to the House subcommittee on appropriations as set out in the hearing before that committee, 83d Cong., 2d sess. (January 4, 1954) Part 1, pp. 96-98, particularly pages 95-97.

States, 299 U. S. 476, 496 (emphasis supplied). The Indian Claims Commission may well consider the age of the claims, the present population of the tribe, the entire course of dealings between the United States and the tribe, the favors, and grants and gratuities made by the United States to the tribe and in its discretion allow a sum which in all the circumstances would be a just increment both to the tribe and to the United States. The sum might be nothing, or one-half, or twice, or any other fraction or multiple of the principal. The judicial discretion would have wide latitude. As matters now stand, it is the impression, probably stemming from decisions in contemporaneous takings, that interest alone is the only measure of just compensation. It may be the best available measure in current claims controlled by the statute of limitations, but it is not necessarily applicable to claims going back 100 years or more where interest at 4 or 5 percent would multiply the principal four or five times. Courts need not operate as mere computing machines in measuring just compensation.

Conclusion

The claim of the Tee-Hit-Ton Indians should be dealt with as if the claimant were a non-Indian invoking the jurisdiction of the Court of Claims. It should not be treated as a test of the compensability of claims before the Indian Claims Commission under the Indian Claims Act.

Respectfully submitted,

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APPENDIX

TABLE OF CLAIMS CURRENTLY PENDING BEFORE INDIAN CLAIMS COMMISSION FOR TAKING OF LAND HELD BY ORIGINAL INDIAN TITLE WHERE THERE IS NO RATIFIED TREATY OF CESSION

Same land duplicated in other claims

Docket No.	Tribe	In Part	Completely
10	Pawnee, Claim 1	Kaw § 33	Docket 10, Claim 2
17	Snake or Piute Indians	Klamath § 100; N. Paiute § 87	
22	Apache Nation, ex rel. etc.	Navajo § 229; Hualapai § 90	Apache § 30; Havasupai § 91
30	Fort Sill Apaches	Navajo § 229; Hualapai § 90	Apache § 22; Havasupai § 91
31	Indians of California		Indians of California § 37
37	Indians of California		Indians of Cal. § 31
44	Uintah Ute Indians	S. Paiute § 88, § 330	
46	Nooksack Tribe of Indians	See § 98	
48	Chiricahua and Warm Springs Tribes of Apaches	Navajo § 229	Apache § 22, § 30
80	Mission Indians of California		Indians of Cal. § 31, § 37
87	Northern Paiute Nation	Indians of Cal. § 31, § 37	
88	Southern Paiute Nation	Indians of Cal. § 31, § 37	
90	Hualapai Tribe of Indians	Apache § 22, § 30	
91	Havasupai Tribe of Indians	Navajo § 229	Apache § 22, § 30
94	Lower Pend d'Oreille or Kalispel		
98	Muckleshoot Tribe of Indians		Possible with § 46, § 240, 261, 262, 263, 293, 294
137	Pueblo De Zia, Jemez and Santa Ana	Navajo § 229	
148	Cabazon Band of Mission Indians		Cal. Indians § 31, § 37
149	Twenty-nine Palms Band of Mission Indians		Cal. Indians § 31, § 37
170	Pascagoula, Biloxi and Movilian Bands of Indians		
171*	Tee-bit-ton Indians		
174	Pueblo De Pecos		
176	Yokiah Tribe of Indians		California § 31, § 37

APPENDIX—Continued

Docket No.	Tribe	Same land duplicated in other claims	
		In Part	Completely
181	Confederated Tribes of the Colville Reservation		
182	Fort Sill Apache		Apache #22, #30
187*	John Billum for himself and natives of Chitina, Alaska		
196	Hopi	Hopi #210; Navajo #229	
210	Hopi Village of Shungopovi	Hopi #196; Navajo #229	
211	Pueblo De Isleta		
214	San Juan Tribe of Indians	(Possibly with same cases listed re #98)	
215	Yana Tribe of Indians		California #31, #37
218	Cowlitz Tribe of Indians	(Possibly with #234, #237)	
221	Chippewa Cree		
222	Confederated Tribes of the Colville Reservation	Nez Perce #180	
227	Pueblo of Laguna	Navajo #227	
228	Gila River Pima-Maricopa Indian Community		
234	Chinook	(See #218)	
237	Upper Chehalis, et al.	(See #218)	
240	Confederated Tribes of Siletz Indians	(See #98)	
261	Samish	(See #98)	
262	Tulalip Tribes, Inc.	(See #98)	
263	Kikiallus Tribe of Indians	(See #98)	
264	Confederated Tribes of the Umatilla Reservation	N. Paiute #87	
265	Coos (or Kowes) Bay, et al.		
266	Acoma Pueblo	Navajo #229	
278*	Tlingit and Haida Indians of Alaska		
283	Colorado River Indians	California #31, #37; Mohave #295; Chemehuevi #351	

285*	Native Village of Unalakleet	
286*	Native Village of Shungnak	
287*	Nisgah Tribe, ex rel.	
288	Washoe Tribe of the States of Nevada and California	California #31, #37
293	Swinomish Tribal Community	(See #98)
294	Skagit Tribe of Indians	Skagit #92; see #98
R. 295	Mohave Tribe of Arizona	California #31, #37; Colorado R. #283; Chemehuevi #351
320	Quechan Tribe of the Fort Yuma Reservation	California #31, #37
325	Morongo Band of Mission Indians	California #31, #37
326	Shoshone Tribe of Indians	N. Paiute #87
330	Southern Paiute Nation	California #31, 37
332	Yankton Sioux	All Sioux cases
333	Stanley W. Miller, Shasta Tribe of California	California #31, #37
344 (2)	Six Nations	Ab. Delaware #202
345	Papago Tribe of Arizona	Apache #22, #30
347	Pitt River Indians of Cal.	California #31, #37
350	Three Affiliate Tribes of Fort Berthold Reservation	Turtle Mountain #113
R. 351	Chemehuevi Tribe of Indians	California #31, #37; Colorado R. #283; Mohave #295
354	Pueblo of San Ildefonso, et al.	
355	Pueblo of Santo Domingo	
356	Pueblo of Santa Clara	
357	Pueblo of Taos	
358	Pueblo of Nambe	
369*	Aleut	
370*	Natives of Palmer, Alaska	

Total without overlaps	21
Total overlapped in part or in whole	51
Grand total	72

* Claim for land in Alaska.

Service of the foregoing brief acknowledged on behalf of the United States this — day of October, 1954.

— —.

Service of the foregoing brief acknowledged this — day of October, 1954.

— —,
Attorney for Petitioner.

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